GAO Protests

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Current as of 9 February 2006

Agenda

- Review Agency Protests
- Compare/Contrast Agency & GAO Protests
- Coordination
- Initial Actions, Stays and Overrides
- Assembling & Transmitting Agency Report
- Supplemental Protests
- Protest Resolution
- Corrective Action
- Summary

Agency Protest Summary

- FAR 33.1 as Supplemented
- Protests must be in writing by interested parties
- Protests should be resolved at lowest level possible
- Protests may be submitted before/after award
  - No later than 10 days after the basis of protest is known or should have been known
  - No later than 5 days after requested/mandatory debriefing
- Contract award postponed/performance suspended
- Award/continued performance prior to resolution must be justified in writing as urgent and compelling or in the best interest of the Government and approved at a level higher than the CO IAW agency procedures

Agency vs. GAO Protest

- Protests must be in writing by interested parties
- Protests may be submitted before/after award
  - No later than 10 days after the basis of protest is known or should have been known
  - No later than 5 days after requested/mandatory debriefing
- Mandatory stay of contract award/performance
- Mandatory stay may be overridden by HCA if justified in writing as urgent and compelling or in the best interest of the Government

Agency vs. GAO Protest

- 4 CFR Part 21 (GAO Bid Protest Regulations)
  - http://www.gao.gov/decisions/bidpro/bid/bibreg.html
- FAR 33.104 – Protests to GAO
- AFFARS MP5333.104-90 Protests to the GAO
- Additional coordination
- Additional deadlines
- Potential for increased time to resolve protest
- Potential for cost to be paid from program funds
- Substantial administrative burden

GAO Protest Coordination

- **Cognizant legal office**
- **Focal Point** designated individual at MAJCOM, DRU, or AFMC Center who receives communication from SAF/AQCX concerning protests against Air Force solicitations or awards
- **SAF/AQCX** serves as the contact point with the GAO for protests ***where an attorney does not represent the protester***
- **Commercial Litigation Division, Air Force Legal Services Agency** (AFLSA/JACN) represents the Air Force ***when an attorney represents a protester***

Initial Actions

- SAF/AQCX
  - Notify focal point
    - Focal point immediately notifies cognizant legal office and contracting activity.
  - Inform focal point whether AFLSA/JACN or SAF/AQCX will represent the Air Force

Initial Actions

- CO ***<u>within 1 business day</u>*** of receiving protest
  - Forward copy to cognizant legal office
  - Provide copy (redacted if necessary) to awardee or:
  - All offerors who appear to have a reasonable prospect of receiving award
- Provide any responses to SAF/AQCX or AFLSA/JCN
- E-mail CO's & cognizant legal office's contact info to gaoprotest@pentagon.af.mil

Initial Actions

- CO ***within 3 business*** days of receiving protest
  - Consult with the cognizant legal office to determine:
    - Whether a stay of performance or award is required
    - If a ***stay*** is required, whether an override will be sought
    - If a ***stay*** is not required, whether a suspension of performance or termination of the contract is in the best interests of the Air Force.
    - Whether ***corrective action*** should be taken.
    - Whether summary dismissal should be requested

Mandatory Stay

- Statutory Requirements (31 U.S.C. § 3551-3556)
- AF must stay award or performance of a contract when notified of a protest within 10 days after the date of contract award or within 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.
- AF can override a stay in appropriate circumstances when it can show a requisite level of harm resulting from a delay of contract award or performance.

Mandatory Stay

- **HCA Override of Stay of Award/Performance**
  - Must be signed by a general officer/member of the senior executive service or, if not available, by the installation commander or deputy
  - Request shall include rationale for override and mandatory findings from FAR 33.104(b)(c)
  - ***Request*** shall be forwarded concurrently to the HCA (via Contracts staff) and SAF/AQCX ***within seven days of the protest notification*** by SAF/AQCX.
  - HCA shall make a ***decision*** with respect to authorizing award or continued performance ***within ten days of the protest notification*** by SAF/AQCX. If circumstances change after suspension of contract performance, the contracting officer may initiate a request to continue performance

Mandatory Stay

- **<u>Overriding Stay of *Award*</u>**
  - May only be overridden by “urgent and compelling circumstances that significantly affect interests of the United States.” These circumstances may include delays, work stoppages, or performance degradations that severely impact mission-critical operations.
  - All requests shall include facts that establish the urgent and compelling circumstances that significantly affect the interests of the United States. The request shall explain why the incumbent’s contract cannot be extended.

Mandatory Stay

- **<u>Overriding Stay of *Performance*</u>**
  - May be overridden either by “urgent and compelling circumstances which significantly affect interests of the United States” or when “performance of the contract is in the best interests of the United States.”
  - Urgent and compelling circumstances may include delays, work stoppages, or performance degradations that severely impact mission-critical operations. The Air Force must specifically address why performance by the particular awardee is urgent and compelling.

Mandatory Stay

- **Overriding Stay of *Performance***
  - If CO doesn't request continued performance authority, contract performance shall cease immediately
  - If pursuant to a request the HCA does not authorize continued performance within ten days of protest notification, the CO shall suspend contract performance.
  - If circumstances change after suspension of contract performance, the contracting officer may initiate a request to continue performance.

Mandatory Stay

- **<u>Overriding Stay of Award or Stay of Performance</u>**
  - Findings
    - Description of goods/services requested & the type of contract
    - Concise summary of protest and the AF position on the merits
    - Required award date and rationale
    - Impact statement if award/performance delayed 30, 60, or 90 days
    - Description of alternative methods for obtaining the required supplies or services (e.g., options, organic capabilities, purchase orders), including a detailed explanation of why such alternatives are not feasible
    - Estimate of termination costs if the protest is sustained and the contract terminated 30, 60, or 90 days after award
    - Name & number of any point of contact at SAF or HQ USAF who knows impact of delay in contract award or performance

Initial Actions

- CO ***within 10 business*** days of receiving protest
  - Provide the statement of facts and ***table of contents*** to cognizant legal office
    - Agency Report ***"Rule 4 File"*** must be submitted to GAO within 30 days after the GAO notifies the agency that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option unless the GAO –
      - GAO dismisses protest
      - Authorizes longer period pursuant to agency request for extension

Agency Report

- CO ***within 15 business days or 7 business days***, if express option is requested of receiving protest
  - E-mail drafts of the initial legal memorandum, statement of facts, and table of contents (including a listing of any requested documents deemed irrelevant and being provided in a separate binder) to gaoprotest@pentagon.af.mil
  - Copy focal point as soon as practicable

Agency Report

- Stand-alone report that can be submitted “as is” by SAF/AQCX or AFLSA/JACN to the GAO.
- Prepare complete copies for
  - GAO
  - Protester
  - Each interested party
  - Either SAF/AQCX or AFLSA/JACN
  - Focal point (except for DRUs and AFMC Centers)
  - Ship all copies of agency report to SAF/AQCX or AFLSA/JACN as directed; ***never to the GAO and other parties***
- 3-ring binders labeled w/protester’s name, protest number, and intended recipient

Agency Report

- Documents numbered & tabbed
  - 5-column table of contents
    - 1st column: “TAB” lists tabs using whole numbers, without letters or decimals
    - 2nd column: “DOCUMENT” provides brief description of document or documents under corresponding tab
    - 3rd column: “DATE” provides date document generated, if known
    - 4th column: “WITHHELD FROM” lists name of any party not receiving the document under the corresponding tab (party already has a copy of the document (e.g., solicitation) or document contains protected information and party doesn’t have counsel admitted under a protective order)
    - 5th column: “PROTECTED” indicates whether the document contains protected information.

Agency Report

Purchase of Sport Utility Vehicles
GAO Protest No. B-876543
Table of Contents

TAB	DOCUMENT	DATE	WITHELD FROM	PROTECTED Y/N
1	Memorandum of Law	11 Dec 05		Y
2	Contracting Officer's Statement of facts	9 Dec 05		Y
3	Protest Document, Kurdish Motors	30 Nov 05		Y

Agency Report

- Tab 1 – Legal Memorandum prepared by cognizant legal office, which includes a legal analysis of each ground of protest
- ***Tab 2 – CO's Statement of facts***
- Tab 3 – Protest

Agency Report

- CO's Statement of facts
  - **<u>Section 1 Overview</u>**: One paragraph describing the procurement including the type of solicitation protested; solicitation number and date issued; a description of goods or services being acquired; a description of the decision protested; the name of the successful contractor, if known; the amount of contract, as awarded and with options; the amount protester bid for basic contract and options; and other pertinent background information.

Agency Report

- CO’s Statement of facts
  - **<u>Section 2 Chronology of Events</u>**: Includes the date and a brief description of significant events in the procurement. The chronology may include the date bids or proposals were originally due; the date final proposal revisions were requested; the date final proposal revisions were received; the date of award; and other pertinent dates.

Agency Report

- CO's Statement of facts
  - **<u>Section 3 Allegations and Response</u>**: Describes and responds to all allegations raised in the protest. The contracting officer shall address each allegation separately and should cite specific language or facts relied upon by the protest allegation and relevant language or facts supporting the Air Force position. Appropriate references to the FAR should also be made.
  - References to documents contained elsewhere in the agency report shall be followed by citations, including tab number and page number.

Agency Report

- Other Documents
  - Bid/proposal submitted by the protester
  - Bid/proposal being considered for award
  - Bid/proposal being protested
  - All evaluation documents (including individual evaluator ratings, scores, analyses, worksheets, and interim and final ratings)
  - Solicitation, including amendments
  - Source selection and technical plans
  - Abstracts of bids or offers
  - Any other relevant documents that would tend to explain the award decision or the adverse action taken with respect to the offeror's proposal

Agency Report

- Requests for Documents by Interested Parties
  - CO shall forward all documents requested by the protester to SAF/AQCX or AFLSA/JACN unless otherwise instructed
  - Documents requested by the protester but deemed not relevant shall be forwarded to SAF/AQCX or AFLSA/JACN in a tabbed binder separate from the agency report. CO should consult cognizant legal office when relevancy of a document is in question.

Agency Report

- Proprietary/Source Selection Sensitive Info
  - CO shall review all documents for proprietary or source selection sensitive info. Any document containing such info must be designated as "protected" in the report TOC. CO should consult cognizant legal office if questions arise.
- Protected documents include,
  - Proposal or document submitted by an offeror (including the protester) containing confidential commercial or financial information
  - Interim or final ratings of any offeror (including those contained in summary documents such as a competitive range determinations, source selection decision documents, or proposal assessment reports

Agency Report

- Protected documents include,
  - Past performance information of any offeror (including the protester)
  - Other “source selection information” and “contractor bid and proposal information” as defined in FAR 3.104-3.

Agency Report

- GAO Protective Order
  - GAO may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.

Agency Report

- Absence of GAO Protective Order
  - CO may include protected documents in agency reports or subsequent filings by ***redacting the material considered proprietary or source selection sensitive***. In such cases, both the original and redacted versions of such documents are provided to SAF/AQCX (or AFLSA/JACN) and GAO. CO will consult with SAF/AQCX or AFLSA/JACN before preparing redacted copies of the agency report.

Transmission of Agency Report

- Contracting activity shall transmit all copies of the agency report using ***overnight delivery*** so that SAF/AQCX or AFLSA/JACN receives them ***not later than 20 days after the Air Force is notified of the protest.***
- GAO Express option procedures, SAF/AQCX or AFLSA/JACN must receive the agency report within ***10 days from the date the express option is invoked***. Only SAF/AQCX or AFLSA/JACN will distribute agency reports to the GAO and other parties.

Transmission of Agency Report

- Focal point shall work in concert with contracting activity and review CO's statement of facts before submission to SAF/AQCX or AFLSA/JACN. Focal point shall ensure CO's statement of facts is in the proper format and addresses all protest allegations and that the agency report is otherwise complete.
- Contracting activity shall submit an electronic version of the agency report when requested by SAF/AQCX or AFLSA/JACN

Supplemental Protests

- Based on the information contained in the agency report, protester may assert supplemental grounds of protest.
- Unless it can be dismissed, a supplemental protest will require an additional response from the agency which is usually more narrow than the original agency report and will normally not require as much documentation.

Protest Hearings

- Any party to protest may request hearing
- AFLSA/JACN represents AF at any hearing
- Contracting activity provides requested witnesses and other support required by AFLSA/JACN
- Contracting activity responsible for funding witness travel and TDY costs
- At the request of AFLSA/JACN, contracting activity obtains and funds court reporter services to transcribe the hearing
- AFLSA/JACN submits comments on the hearing to GAO. CO produces additional info as requested

Protest Resolution

- GAO usually issues decision within 100 days
  - Decisions involving protected info released to parties under protective order
  - Releasable only within Gov’t
  - Redacted public decision issued at later date
- Denial/Dismissal closes protest and releases agency to proceed with contract actions upon notification

Protest Resolution

- If the protest is sustained, the GAO will also recommend corrective action and payment of protest costs. In unusual cases, the GAO will also recommend payment of proposal preparation costs.
- Potential costs may include attorney fees and in-house costs related to pursuit of the protest.
- Costs must be paid by the base or procuring activity
- Protester must submit a cost claim to the agency within 60 days of a decision or recommendation to award costs.

Protest Resolution

- Forward cost claim immediately to AFLSA/JACN.
- AFLSA/JACN may offer settlement to protester, subject to the approval of the CO.
- If a settlement cannot be reached, the GAO may decide the claim in a written decision. Once a final figure is determined (either through settlement or by the GAO), CO arranges for payment to the protester.

Protest Resolution

- **<u>ADR</u>**: Air Force policy is to use ADR to the maximum extent practicable; however, the feasibility of ADR depends on the facts and circumstances of the protest.
  - Outcome Prediction: A common form of ADR in which the GAO advises the parties of its likely position if the protest were resolved in a written decision. The viability of outcome prediction depends on the nature of the protest (usually a few discrete issues for which there is clearly established precedent) and the GAO attorney assigned to the case. ***<u>Outcome prediction is not binding on the parties, but Air Force policy is to follow the outcome prediction recommendations</u>***.

Protest Resolution

- **<u>Settlement</u>**: The Air Force may decide to settle a protest. A settlement shall be a formal, written agreement ***<u>signed by the contracting officer</u>*** or, if appropriate, by the cognizant Air Force attorney. A settlement shall include the actions the Air Force agrees to such as to take corrective action, pay certain protest costs, produce selected documents, or take other fact-specific actions. In exchange, the protester agrees to withdraw its protest and may waive certain cost entitlements. Settlement of a protest is not a "payoff" to the protester, and is only pursued when doing so is in the best interests of the Air Force considering cost factors and litigation risk. If a settlement is negotiated, the contracting officer shall fax a copy of the signed settlement agreement to SAF/AQCX and AFLSA/JACN.

Protest Resolution

- **<u>Withdrawal</u>**: (5) Withdrawal. The protester may withdraw the protest, either because of corrective action taken by the Air Force or for other reasons. Once the protester gives notice of withdrawal to the GAO, the contracting activity can resume all contractual actions.

Corrective Action

- May be taken by the AF at any time during the protest process or upon GAO recommendation when a protest is sustained.
- Corrective action is appropriate when a significant flaw in the procurement process has been discovered or when GAO precedent suggests that the protest will likely be sustained
- Corrective action taken prior to submission of the agency report will usually prevent the agency from having to pay protest costs. In contrast, corrective action taken after submission of the agency report will often result in the agency having to pay costs.

Corrective Action

- Reporting: Within five days of a decision to take corrective action the CO shall
  - Provide a corrective action plan to SAF/AQCX and AFLSA/JACN
  - Notify SAF/AQCX and AFLSA/JACN if there are any significant changes to the corrective action plan, if the corrective action will not be completed within 60 days and when the corrective action is complete
  - Copy the focal point

GAO Protest Summary

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GAO Protest Summary

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